Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13632
Docket No. 13490
01-2-99-2-91

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen Division/
(Transportation Communications International Union
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Springfield Terminal Railway violated the terms of our current agreement, in particular Rule 13.3 when they failed to compensate Duly Accredited Representative William Fulton when he represented two (2) employees at a formal investigation held on January 22, 1998.

2. That accordingly, the Springfield Terminal Railway Company be ordered to compensate Carman and Duly Accredited Representative William Fulton in the amount of seven (7) hours pay at the straight time rate. This is the amount he would have been entitled had the carrier not violated the agreement."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The dispute in this case centers on the meaning and interpretation of Rule 13.3 of the parties' December 3, 1995 Agreement, which states in pertinent part as follows:

> "13.3 . . . The employee will have the right to be represented by a Duly Accredited Representative of his own choosing and he and his representative will have the right to question all witnesses. If the hearing is scheduled during the duly accredited local representative's regular working hours, he will be allowed time without loss of pay to represent employees . . ."

On January 22, 1998, the Carrier held two separate Investigations on behalf of Carmen assigned at Lowell, Massachusetts. The employees requested that the Claimant represent them at the Investigations. The Claimant, who holds a regular position at the Carrier's East Deerfield shop, performed one hour of service that day and then traveled the distance between the East Deerfield Shop and the Lowell shop, approximately 80 miles, to attend the Investigations. Due to the travel time and the length of the Hearings, the Claimant was unable to work the remainder of his assigned hours at East Deerfield. The instant claim was precipitated when the Carrier paid the Claimant only one hour for services performed at the East Deerfield shop and denied the requested compensation for the remaining seven hours spent in connection with the two Investigations at the Lowell shop.

At issue is the intention of the parties in referring to the "duly accredited local representative" in Rule 13.3 and whether they agreed to compensate the representative from the local lodge, as the Organization contends, or whether the word "local" was intended to mean a representative headquartered at the same location as the Carrier urges.

The Organization pointed out that there are two local lodges covering the three points on the system. Waterville, Maine, is identified as Local Lodge 6923, while East Deerfield and Lowell, Massachusetts, are identified as Local Lodge 6315. The Claimant is the representative and Vice Local Chairman of Lodge 6315 for the points of East Deerfield and Lowell. There are ten employees at East Deerfield and nine employees at Lowell represented by Lodge 6315.

The General Chairman designated one designee of each lodge to represent employees pursuant to Rule 1.1 of the Agreement, the Organization further contends. Rule 1.1 states: "Duly Accredited Representative means the General Chairman of the Brotherhood of Railway Carman Division of the TCU and/or his designee, designated to represent employees pursuant to this agreement." The Claimant is the only qualified, designated representative for Local Lodge 6315, the Organization submits, and the Carrier should accept that designation.

Management's contention that "local" representative means local to the point where employed is also contrary to the history of negotiations, common sense, past practice, and decisions of the Board, the Organization asserts. Letters dated May 1 and 12, 1998 from two of the Organization's bargaining committee members were included in the record on the property and indicate that the term "local" in Rule 13.3 was inserted by the parties during negotiations to avoid the necessity of compensating a duly accredited non-Carrier representative. Furthermore, the Organization directs our attention to the fact that the Claimant was compensated a full eight hours pay for representing an employee at an Investigation at Waterville, Maine, on July 17, 1996. On two other occasions, February 14, 1997 and September 25, 1997, the Claimant represented employees at Investigations and his claims for compensation under Rule 13.3 were sustained by the Board. See, Second Division Awards 13461 and 13572.

It is the Carrier's position that the Claimant's request for compensation is unwarranted. It asserted on the property and in its Submission that the language of Rule 13.3 clearly and unambiguously states that only the local representative will be paid for time spent representing employees, and that this language was a compromise arrived at by the parties during bargaining. The Carrier further contends that the Agreement read as a whole makes it clear that when the word "local" is capitalized in the provisions of the Agreement, it refers to the Organization as a political entity, whereas the use of the word "local" in the lower case is intended to refer to a geographical entity. The Carrier states that the Organization is correct when it argues that employees are free to request any duly accredited representative they desire for their disciplinary hearings, and the Organization is similarly free to authorize any duly accredited representative they desire to handle these hearings. However, the Carrier is obligated to compensate only the duly accredited local representative who is at the site of the hearing and who leaves his regular assignment to go the hearing and can return to that assignment when the hearing is over. To the Carrier, the instant claim represents just the scenario it was trying to avoid when the language of Rule 13.3 was

incorporated for the first time in the current Agreement. The Claimant is seeking seven hours pay because he had to mark off from his East Deerfield assignment, travel to Lowell to attend two hearings which lasted only four hours, and then travel back to East Deerfield. The Claimant is not the local representative at Lowell, and he is therefore not entitled to payment under Rule 13.3.

The Carrier further argues that this is not a case of first impression. Award 8 of Public Law Board No. 5860 involved nearly the identical situation between the Carrier and the IBEW. The applicable language is the same as in the Carmen's Agreement, and in that case the Board found that the Carrier was required to compensate only the representative who is local to the geographic location. The Carrier also asserts that Second Division Award 13461 is supportive of its position and that the basis for sustaining that claim - the Carrier's failure to rebut a statement by the Organization regarding bargaining history - does not exist in this case.

The crux of the matter here centers on the meaning of the word "local" as it is used in Rule 13.3 and whether the Carrier must pay the Claimant for attending the Investigative Hearings on January 22, 1998. Although the Carrier has urged that the term "local" is plain and clear, we find that there is considerable ambiguity in the language used. While the Carrier's interpretation is plausible, the Board finds that the Organization's interpretation is also tenable. Under those circumstances, the Board may properly consider extrinsic evidence in the form of bargaining history or past practice to ascertain what the parties intended the words to mean.

Our task in that regard is made easier by the fact that two prior Awards on this same property, with these same parties, indeed, with this same Claimant, have concluded that bargaining history supports the Organization's position. In Second Division Award 13461, the Board noted that Award 8 of Public Law Board No. 5860 was distinguishable in that the Organization had submitted two statements from local representatives who were present during negotiations and who confirmed that the Carrier was concerned during bargaining that it not be required to pay a duly accredited representative from outside of the employ of the Carrier, such as a General Chairman or Local Chairman who worked either as a full-time union representative or for another company. The negotiators for the Carrier thus insisted that the words "local duly accredited representative" be used so that only Carrier-employed representatives would be paid to represent Carmen. Noting that this statement stood unrebutted, and that no such

evidence of negotiations had been present in Award 8 of Public Law Board 5860, the claim was sustained.

The claim in Second Division Award 13572 was in a similar posture. Evidence of bargaining history, presented by the Organization on October 8, 1998, was not refuted by the Carrier despite the fact that two months elapsed between its receipt and the Notice of Intent filed with the Board. In that case, as in Award 13461, the Board took note of the "unrebutted evidence of the Organization's negotiating committee that 'local' was intended to refer only to representatives employed by the Carrier, and to exclude those who were non-employees."

These points of similarity cannot be disregarded in considering the instant case. As in the two prior cases, the Organization submitted statements by two of its bargaining committee members during the on the property handling of the claim. The Carrier's response, in an April 7, 1999 letter, was to assert that the Carrier negotiating members disputed the statements. Assertions, however, are not evidence, and cannot reasonably be relied upon to determine the parties' intent at the bargaining table. Accordingly, we find that the Organization established that the insertion of the term "duly accredited local representative" in the context of Rule 13.3 was intended not as a geographic limitation but to prevent extended liability on the part of the Carrier in compensating duly accredited representatives who did not work for the Carrier.

Certainly, the Board would not be justified in following an Award considered to be clearly erroneous or one whose continued application is rendered questionable by changed conditions. But neither circumstance is present here. Adherence to the prior decisions of these parties, especially when departure is not adequately explained, is desirable in order to establish a consistent body of interpretation of the same provisions of the contract under similar facts.

In conclusion, it is our finding that the Organization has shown, in the face of ambiguous contract language, that extrinsic evidence supports the claim for compensation sought under Rule 13.3. Prior Awards have reached that same conclusion. Therefore, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 3rd day of July, 2001.